



[Billing Code: 4810–31–P]

## **DEPARTMENT OF THE TREASURY**

### **Alcohol and Tobacco Tax and Trade Bureau**

#### **27 CFR Part 4**

**[Docket No. TTB–2019–0004; Notice No. 182]**

**RIN: 1513–AB56**

### **Elimination of Certain Standards of Fill for Wine**

**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In this document, the Alcohol and Tobacco Tax and Trade Bureau (TTB) addresses numerous petitions requesting that TTB amend the regulations that govern wine containers to provide for additional authorized standards of fill. TTB is proposing to eliminate all but a minimum standard of fill for wine containers and thus eliminate unnecessary regulatory requirements and provide consumers broader purchasing options. TTB welcomes comments on this proposed deregulation, and it also seeks comments on the relative merits of alternatives, such as adding new authorized standards of fill and developing an expedited process for adding additional standards in the future. All of these approaches would eliminate restrictions that inhibit competition and the movement of goods in domestic and international commerce.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Please send your comments on this proposed rule to one of the following addresses:

- Internet: <https://www.regulations.gov> (via the online comment form for this document as posted within Docket No. TTB–2019–0004 at “Regulations.gov,” the Federal e-rulemaking portal);

- U.S. Mail: Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; or

- Hand delivery/courier in lieu of mail: Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 400E, Washington, DC 20005.

See the **Public Participation** section of this document for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this proposed rule and any comments TTB receives about this proposal at <https://www.regulations.gov> within Docket No. TTB–2019–0004. A link to that docket is posted on the TTB Web site at <https://www.ttb.gov/wine/wine-rulemaking.shtml> under Notice No. 182. You also may view copies of this proposed rule and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20005. Please call 202–453–2135 to make an appointment.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Berry, Alcohol and Tobacco Tax and Trade Bureau, Regulations and Rulings Division; telephone 202–453–1039, ext.275.

**SUPPLEMENTARY INFORMATION:**

**Background**

TTB Authority

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers regulations setting forth bottle size and related standards of fill for containers of wine products distributed within the United States. The authority to establish these standards is based on section 105(e) of the Federal Alcohol Administration Act (FAA Act), codified at 27 U.S.C. 205(e), which authorizes the Secretary of the Treasury to prescribe regulations relating to the “packaging, marking, branding, and labeling and size and fill” of alcohol beverage containers “as will prohibit deception of the consumer with respect to such products or the quantity thereof ... .” TTB administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, as codified at 6 U.S.C. 531(d). In addition, the Secretary of the Treasury has delegated certain FAA Act administrative and enforcement authorities to TTB through Treasury Order 120–01, dated January 24, 2013 (superseding Treasury Order 120–01, dated January 24, 2003).

Current Standards of Fill for Wine

The standards of fill for wine are contained in subpart H of part 4 of the TTB regulations (27 CFR part 4). The term “standard of fill” is used in the TTB regulations and in this document to refer to the authorized amount of liquid in the

container, rather than the size or capacity of the container itself. For better readability, however, this document sometimes uses the terms “size” or “container size” and “standards of fill” interchangeably. Within subpart H, paragraph (a) of § 4.72 (27 CFR 4.72(a)) authorizes the use of the following metric standards of fill for containers other than those described in paragraph (b) of that section:

- 3 liters;
- 1.5 liters;
- 1 liter;
- 750 milliliters;
- 500 milliliters;
- 375 milliliters;
- 187 milliliters;
- 100 milliliters; and
- 50 milliliters.

Paragraph (b) of § 4.72 states that wine may be bottled or packed in containers of 4 liters or larger if the containers are filled and labeled in quantities of even liters (4 liters, 5 liters, 6 liters, etc.).

#### Current Headspace Requirements for Wine

Requirements for headspace, the empty space between the top of the wine and the top of the container, are also contained in subpart H of 27 CFR part 4. Within subpart H, paragraph (a)(3) of § 4.71 (27 CFR 4.71(a)(3)) states that a standard wine container must be made and filled so as to have a

headspace not in excess of 6 percent of the total capacity of the container after closure if the net content of the container is 187 milliliters or more and, in the case of all other wine containers, a headspace not in excess of 10 percent of such capacity.

#### Current Standards of Fill for Distilled Spirits and Malt Beverages

The standards of fill for distilled spirits are contained in subpart E of part 5 of the TTB regulations (27 CFR part 5). In a separate notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**, TTB is also proposing to eliminate most of the standards of fill for distilled spirits.

Unlike wine and distilled spirits, there are no standards of fill prescribed for malt beverages under the FAA Act. However, in the case of malt beverages, § 7.22(a)(4) of the TTB regulations (27 CFR 7.22(a)(4)) requires the display of net contents on the brand label as mandatory label information.

#### History of Standards of Fill for Wine

Standards of fill for wine were first established in October 1941 by T.D. 5093 (6 FR 5465, October 25, 1941), which became effective in October 1943. Those standards were as follows:

- 4.9 gallons;
- 3 gallons;
- 1 gallon;
- 1/2 gallon;
- 1 quart;
- 4/5 quart;

- 4/5 pint;
- 2/5 pint;
- ounces;
- 3 ounces; and
- 2 ounces.

Over the years, a number of changes were made to these standards. The most significant change took place in 1974 when TTB's predecessor agency, the Bureau of Alcohol, Tobacco and Firearms (ATF), adopted metric standards of fill for wine containers. These metric standards were adopted in T.D. ATF-12 (39 FR 45216, December 31, 1974). ATF provided a phase-in period for the new metric sizes that lasted until January 1, 1979, at which time metric sizes became mandatory. The metric standards of fill originally adopted for wine were as follows:

- 3 liters;
- 1.5 liters;
- 1 liter;
- 750 milliliters;
- 375 milliliters;
- 187 milliliters; and
- 100 milliliters.

Later amendments to the metric standards for wine containers included:

- T.D. ATF-49 (43 FR 19846, May 9, 1978), which allowed whole liter sizes larger than 3 liters;

- T.D. ATF–76 (46 FR 1725, January 7, 1981), which added the 50-milliliter miniature size; and
- T.D. ATF–303 (55 FR 42710, October 23, 1990), which allowed the 500-milliliter size in interstate commerce. Prior to the Treasury decision, it could only be used for intrastate commerce or export.

### **Prior Notices Seeking Comments on Changes to Standards**

In addition to the rulemakings cited above that adopted or amended standards of fill for wine, ATF twice solicited comments on whether the standards of fill should be retained, revised, or eliminated.

In 1987, ATF published an advance notice of proposed rulemaking (ANPRM), Notice No. 633 (52 FR 23685, June 24, 1987), which solicited comments on whether the standards of fill requirements for distilled spirits and wine should be retained either in general or as metric standards. The Washington State Liquor Control Board (WSLCB) had petitioned ATF to amend the regulations to allow for the importation of distilled spirits not bottled in authorized metric standards of fill if the bottles were labeled with certain additional information.

In its petition, the WSLCB stated that many foreign manufacturers bottle their spirits in standards of fill that are not authorized in the United States (for example, 740 milliliters and 800 milliliters). Consequently, while these products could be shipped to other countries, they could not be imported into the United States. The WSLCB argued that the existing standards of fill stifled price competition on imported distilled spirits, resulting in an artificial price increase for

U.S. consumers. Although the petition requested an amendment of the standards of fill requirements for distilled spirits only, the ANPRM requested comments on retaining or eliminating the standards of fill for distilled spirits and wine. On February 6, 1990, ATF published Notice No. 696 (55 FR 3980) and stated that it found no basis to eliminate the existing standards of fill for wine and distilled spirits.

In 1993, ATF published another ANPRM, Notice No. 773 (58 FR 35908, July 2, 1993), in response to three petitions requesting the reinstatement or addition of four sizes to the standards of fill for distilled spirits. The petitioners requested that the regulations be amended to include four sizes used in other countries: A 296-milliliter can, a 500-milliliter bottle, a 680-milliliter bottle, and a 946-milliliter bottle. The petitioners also made many of the same arguments for retaining the existing standards that were noted in Notice No. 696. Although these petitions only involved an amendment to the existing standards for distilled spirits, ATF believed it was also appropriate to address the larger issue of retaining or eliminating the standards of fill requirements for distilled spirits and wine. A common theme in the three petitions was that the current standards of fill were hindering international trade between the United States and countries with different standard container sizes. As a result, ATF sought comment in Notice No. 773 on whether the existing standards of fill should be revised, retained, or eliminated. ATF did not undertake further rulemaking on this issue.



## **Petitions and Inquiries Regarding Changes to Standards**

In the past several years, TTB has received a number of petitions and inquiries regarding changes to the standards of fill requirements for wine.

Several of these petitions and inquiries were from producers, bottlers, and importers interested in distributing wine in cans. Generally speaking, these industry members assert that the standards of fill they propose (200, 250, and 355-milliliters) are standard can sizes prevalent in the United States and would therefore be more cost efficient for them to use than the sizes currently authorized in § 4.72. These petitions and inquiries addressing can sizes include the following:

1. A U.S. wine bottler submitted a petition requesting that § 4.72 be revised to allow wine to be packaged in 200-milliliter cans. The bottler stated that 200-milliliters is a standard can size, while the 187-milliliter size authorized in § 4.72 is difficult to obtain.

2. A California winery that packages its wine in 187-milliliter cans also petitioned for the addition of the 200-milliliters size to § 4.72 for metal containers having the general shape and size of a can. The petitioner stated that it must have its 187-milliliter cans custom manufactured, which is costly and inefficient. Additionally, the petitioner noted that 200-milliliters is listed in 27 CFR 5.47a as an approved standard of fill for distilled spirits packaged in metal containers. According to the petitioner, approving that size for wine would bring the wine standards of fill in line with can industry standards and the standards of fill for distilled spirits and non-alcoholic beverages.

3. An Argentine winery petitioned for the addition of 355-milliliter and 250-milliliter sizes to § 4.72. The winery packages its products in 12-ounce (355-milliliter) and 8.4-ounce (250-milliliter) aluminum cans, but is unable to sell its product in the U.S. marketplace since these sizes are not authorized in § 4.72.

4. An importer of Australian wine inquired about selling 250-milliliter cans of wine to concert and sporting arenas, but was unable to do so since 250-milliliter is not an authorized standard of fill as prescribed in § 4.72.

5. A U.S. producer of wine and distilled spirits filed a petition requesting that TTB authorize a 355-milliliter standard of fill, or 12 ounces, for wine sold in cans. Currently, the petitioner sells wine packed in a 12 ounce cans only in Puerto Rico, and would like to use the same size cans for wine sold in the rest of the United States.

6. A Colorado-based winery that packages its wine in cans petitioned TTB to approve 250-milliliters as an authorized standard of fill. The petition noted that the 250-milliliter size has become standard in the U.S. for various beverages, including wines that contain less than 7 percent alcohol by volume and are thus not regulated under the FAA Act. It argues that this creates an unfair playing field for many wineries and that the current rules restrict sales, growth, and job creation.

In addition to the petitions discussed above that addressed the packaging of wine in cans, TTB also received a petition from an importer of boxed wine requesting that the agency authorize a standard of fill of 2.25 liters for wine containers. The importer states that such a container would significantly reduce

environmental impact because it holds as much as three 750-milliliter wine bottles at half the weight of such bottles.

Additionally, TTB has received several inquiries over the years regarding the importation of the French product known as “vin jaune” (“yellow wine” in English). Vin jaune is made in the Jura region of France, using a technique similar to that used for making Sherry. In accordance with French and European Union regulations, it must be sold in a 620-milliliter bottle. Since 620-milliliters is not an authorized size in § 4.72, vin jaune cannot be imported into the United States.

Finally, foreign governments have contacted TTB regarding the wine standards of fill regulations. Among these was a 2007 request from the Government of Moldova asking that TTB waive the standards of fill requirements for importations of Moldovan wine. At the time, Moldova reported that it had over a million bottles of aged wine in its National Treasury of Wine that could not be sold in the United States due to the U.S. bottle size limitations. Also in 2007, the Government of Georgia requested that TTB add the 700-milliliter bottle to the authorized standards of fill. It stated that the 700-milliliter bottle was a standard size in the former Soviet Union, and the addition of the 700-milliliter standard of fill in the TTB regulations would eliminate a restriction on the sale of Georgian wines in the United States.

### **Petition Regarding Bottle Headspace**

TTB has also received a petition from a company that imports individually sealed glasses of wine from France and markets them in North America. These

individually sealed 100 milliliter size glasses of wine were designed to enable consumers to drink a glass of wine without having to open a full bottle. However, the product must comply with 27 CFR 4.71(a)(3), which requires a headspace not in excess of 10 percent for containers smaller than 187 milliliters. The petitioner stated that these containers require more than the maximum 10 percent headspace allowance for the following reasons:

- A minimum of 25 to 30 percent headspace is required to keep wine away from the edge of the glass during the manufacturing process, thus ensuring the glass container is sealed correctly.
- If the headspace were the required 10 percent, consumers would likely spill the contents when peeling off the aluminum foil due to the strength of the seal.

The petitioner also noted in support of its petition that, since the glass container will be clear, the purchaser will clearly see the actual content and the actual net content will be clearly identified on the label.

### **TTB Proposal**

In view of the points made in the petitions and inquiries discussed above, TTB believes that it is appropriate to revisit the wine standards of fill issue. TTB is proposing to eliminate the existing standards of fill for wine, except that the regulations would maintain a minimum standard of 50 milliliters. The minimum container size is needed to ensure sufficient space on the container for required labeling. TTB also welcomes comments on merely adding some or all of the standards of fill requested in the petitions, or adding some or all of those

standards and also adopting an expedited approach for adding new sizes in the future. TTB is considering eliminating the standards of fill for the following reasons:

1. Executive Order 13771, titled “Reducing Regulation and Controlling Regulatory Costs,” and Executive Order 13777, titled “Enforcing the Regulatory Reform Agenda,” task Federal agencies with identifying and eliminating regulations to reduce regulatory burdens and costs for industry. TTB believes that this proposal is aligned with these Executive Orders as explained below.

2. Elimination of the existing standards of fill would address the recent petitions on this issue, would eliminate the need for industry members to petition for additional authorizations if marketplace conditions favor different standards in the future, and would eliminate requirements that restrict competition and the movement of goods in domestic and international commerce.

3. It would address concerns that the current standards of fill unnecessarily limit manufacturing options and consumer purchasing options, particularly where consumers may seek smaller containers to target a specific amount of consumption.

4. TTB believes that current and proposed labeling requirements regarding net contents (see 27 CFR 4.32(b)(2) and 4.37) and those regarding the design and fill of containers (see 27 CFR 4.71) provide consumers with adequate information about container contents.

TTB is not aware of consumer deception issues related to container sizes of malt beverages, for which there is no standard of fill requirement. In addition

to eliminating the current standards of fill for wine containers, TTB proposes to amend the current headspace requirements for wine in 27 CFR 4.71(a)(3).

Specifically, TTB is proposing to allow wine bottled in a clear, 100-milliliter or smaller container to contain a headspace of not more than 30 percent of the total capacity of the container. The proposed revision would allow more wine products to be bottled in individually sealed glasses such as those described above. This would be permitted only for wine bottled in a clear container so that the consumer would be able to see the actual contents of the container, thus reducing the possibility of consumer deception.

#### Discussion of the Proposed Changes

Regarding the specific regulatory amendments proposed in this document, TTB notes the following:

- In § 4.32, which concerns mandatory label information for wine, paragraph (b)(2) is amended by removing the second sentence, which would no longer be relevant if the referenced standards of fill are removed.
- In § 4.37, which concerns net contents, the introductory text of paragraph (a) is revised to remove the several references to “standard of fill” and to replace the words “prescribed in § 4.72” with a reference to § 4.71, which is revised as discussed below. In addition, the introductory text of paragraph (b) is revised, and current paragraph (b)(1) is removed and paragraphs (b)(2) and (3) are redesignated as (b)(1) and (2) respectively, to reflect the removal of the standards of fill.

- Section 4.70, which concerns the application of standard wine container requirements (i.e., design, fill, and headspace) and the standards of fill requirements, is amended by removing references to § 4.72.
- Section 4.71, which concerns standard wine containers, is revised to remove a reference to § 4.72, to include tolerances (discrepancies between actual and stated fill), in the paragraph concerning fill, to require a minimum fill of 50 milliliters, and to add the 30 percent headspace allowance for 100-milliliter or smaller containers as discussed above.
- Finally, § 4.72, which specifies the metric standards of fill for wine, is removed because it would no longer serve any purpose.

#### Alternatives to the Proposal

TTB is also considering maintaining the standards of fill but liberalizing the existing regulatory scheme. It simply could add some or all of the petitioned-for standards (200, 250, 355, 620, and 700 milliliters and 2.25 liters) to § 4.72(a). It also could institute an expedited process for considering future petitions to add additional standards of fill and help ensure § 4.72 is non-discriminatory and does not create unnecessary obstacles to competition, trade, or investment. For example, TTB could amend its regulations in § 4.72 to provide for administrative approvals of standards of fill. Under such an expedited system, the Administrator could authorize new standards of fill in response to a petition if the petition shows good cause for approval (such as commercial viability), barring the Administrator determining that the proposed standard would cause confusion. Administratively

approved standards of fill then would be published on the TTB website so that other industry members are aware of the additional authorized sizes.

## **Public Participation**

### Comments Sought

TTB requests comments on the proposals to eliminate the standards of fill for wine (with the exception of a minimum 50-milliliter specification) and to add a new headspace specification for wine bottled in a clear, 100-milliliter or smaller container. TTB also requests comments on alternative approaches, such as maintaining the standards of fill but adding some or all of the petitioned-for standards (200, 250, 355, 620, 700 milliliters and 2.25 liters) to § 4.72(a)—including comments on the alternative of developing an expedited process for adding new standards of fill in the future and the criteria for approval of specific standards under an expedited process. Additionally, TTB understands that some state regulations on standards of fill for wine may incorporate TTB regulations by reference. TTB requests comments from state regulators on whether this proposal will present a regulatory issue at the state level. TTB invites any other suggestions or alternatives related to the issue of standards of fill, including headspace requirements, for wine. Given the absence of standards of fill for malt beverages, TTB would be particularly interested in comments that address the merits of continuing to apply different rules to wine and spirits.

Any person submitting comments may present such data, views, or arguments as he or she desires. Comments that provide the factual basis



supporting the views or suggestions presented will be particularly helpful in developing a reasoned regulatory decision on this matter.

### Submitting Comments

You may submit comments on this notice of proposed rulemaking by one of the following three methods:

- Federal e-Rulemaking Portal: You may send comments via the online comment form posted with this proposed rule within Docket No. TTB–2019–0004 on “Regulations.gov,” the Federal e-rulemaking portal, at <https://www.regulations.gov>. A direct link to that docket is available under Notice No. 182 on the TTB Web site at <https://www.ttb.gov/wine/wine-rulemaking.shtml>. Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, click on the site’s “Help” tab.

- U.S. Mail: You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.

- Hand Delivery/Courier: You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 400E, Washington, DC 20005.

Please submit your comments by the closing date shown above in this proposed rule. Your comments must reference Notice No. 182 and include your name and mailing address. Your comments also must be made in English, be

legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and considers all comments as originals.

In your comment, please clearly state if you are commenting for yourself or on behalf of an association, business, or other entity. If you are commenting on behalf of an entity, your comment must include the entity's name as well as your name and position title. In your comment via Regulations.gov, please enter the entity's name in the "Organization" blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

#### Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

#### Public Disclosure

TTB will post, and you may view, copies of this proposed rule and any online or mailed comments received about this proposal within Docket No. TTB–2019–0004 on the Federal e-rulemaking portal. A direct link to that docket is available on the TTB Web site at <https://www.ttb.gov/wine/wine-rulemaking.shtml> under Notice No. 182. You may also reach the relevant docket through the

Regulations.gov search page at <https://www.regulations.gov>. For information on how to use Regulations.gov, click on the site's "Help" tab.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including e-mail addresses. TTB may omit voluminous attachments or material that it considers unsuitable for posting.

You may view copies of this proposed rule and any electronic or mailed comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20005. You may also obtain copies for 20 cents per 8.5- x 11-inch page. Contact TTB's Regulations.gov administrator at the above address or by telephone at 202-453-2135 to schedule an appointment or to request copies of comments or other materials.

## **Regulatory Analysis and Notices**

### **Analysis of Impacts**

The Administrator of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, has waived review of this proposed rule in accordance with section 6(a)(3)(A) of Executive Order 12866. OIRA will subsequently make a significance determination of the final rule, pursuant to section 3(f) of Executive Order (E.O.) 12866. The impacts of this proposed rule have been examined in accordance with Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule is

anticipated to be designated under Executive Order 13771 as a deregulatory action.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this proposed rule would increase regulatory flexibility by expanding the options available to small entities, we propose to certify that the rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of costs and benefits before proposing a rule with mandates that “may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” This proposed rule would impose no new mandates.

#### *Purpose of the Rule*

Several regulatory requirements are intended to decrease the risk that consumers will misjudge the quantities of wine in containers available for sale. These include:

- A requirement that quantities of wine conform to values on a list of standard quantities, with each of the standard quantities separated by at least 50 milliliters (27 CFR 4.71 (a)(2)); and
- A limitation on the amount of unfilled headspace at the top of the container (27 CFR 4.71 (a)(3)).

The standard quantities are called “standards of fill.” A requirement that, with few exceptions, a quantity available for sale match a standard of fill may decrease the risk of consumer confusion, but, under some circumstances, the limitation also decreases economic efficiency by preventing production at the lowest possible cost. Limiting the amount of headspace in containers may decrease the risk of consumer confusion, but, under some circumstances, that limitation may decrease economic efficiency by preventing desirable products from entering the market.

This proposed rule would eliminate the requirement that quantities correspond to standards of fill, allowing wine to be sold in any quantity of 50 milliliters or more. The proposed rule would also increase permitted headspace for individually sealed glasses of wine in clear containers. These changes are expected to increase economic efficiency by allowing manufacturers to produce at lower costs and introduce products that would otherwise be prohibitively costly or explicitly forbidden.

### *Background*

Businesses are categorized by type using the North American Industry Classification System (NAICS). Establishments primarily engaged in manufacturing wines and brandies are classified under NAICS code 312130. Establishments primarily engaged in the wholesale distribution of wine and distilled spirits are classified under NAICS code 424820. Establishments primarily engaged in retailing alcoholic beverages, including wine, are classified under NAICS code 445310.

Total establishments, employees, and payroll for each category are reported by the Census Bureau in the County Business Patterns (CBP) data series. The most recent year for which CBP data were available at the time of this analysis was 2016. Total receipts for establishments in each category are reported by the Census Bureau in the Statistics of U.S. Businesses (SUSB) data series. The most recent year for which SUSB receipt data were available at the time of this analysis was 2012. Table 1 reports total establishments, employees, payroll, and receipts for each category.

**Table 1: Industry Information**

| <b>Industry</b>  | <b>NAICS Code</b> | <b>Establishments</b> | <b>Employees</b> | <b>Payroll (\$millions)</b> | <b>Receipts (\$millions)</b> |
|--|-------------------|-----------------------|------------------|-----------------------------|------------------------------|
| Wineries   | 312130            | 3,604                 | 51,107           | 2,520                       | 15,525                       |
| Wholesalers specializing in wine and distilled spirits     | 424820            | 2,599                 | 87,026           | 6,462                       | 76,170                       |
| Retailers specializing in wine & other alcoholic beverages | 445310            | 33,958                | 167,286          | 3,795                       | 43,085                       |

Sources: Establishment counts, employee counts, and payroll are from 2016 County Business Patterns data published by the Census Bureau. Receipts are from 2012 Statistics of U.S. Businesses data published by the Census Bureau.

Although wine is typically sold in glass bottles, wine is also available in other types of containers, including aluminum cans. Sales of canned wine have grown rapidly in recent years, reaching \$28 million in 2017, up from \$14.5 million

in 2016 and \$6.4 million in 2015.<sup>1</sup> However, canned wine still accounts for only about 0.2 percent of all wine sales.<sup>2</sup>

### Costs

This proposed deregulation would, if implemented, impose no new mandates. However, the rule could create some costs for both consumers and producers. We are unable to quantify the costs, but welcome public comment with relevant information.

Consumers who know that quantities conform to the standards of fill can misjudge a quantity only by mistaking one standard quantity for another. The difference between the smallest standard, 50 milliliters, and the next standard, 100 milliliters, is 50 milliliters, or 100 percent of the smaller standard. The absolute differences between adjacent standards are typically larger for larger quantities, and, for quantities below 3 liters, never fall below 33 percent of the smaller standard. Large differences between standards decrease the risk that one quantity on the list of standards will be mistaken for another.

The rule would create costs for consumers if eliminating the standards of fill increased confusion about the quantities available for sale. However, confusion about quantities available for sale would continue to be limited by other regulations, including a requirement that net contents appear on a label affixed to the container (27 CFR 4.32(b)(2)), a prohibition against containers designed in

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<sup>1</sup> Martha C. White, "Canned wine is the drink of summer 2017. Here are our top picks." Money. June 14, 2017, *available at* <http://time.com/money/4816413/canned-wine-can-juice-box-rose-sparkling/>.

<sup>2</sup> Nielsen, "Heard it through the grapevine: Wine trends to watch for in 2018." Jan. 16, 2018, *available at* <http://www.nielsen.com/us/en/insights/news/2018/heard-it-through-the-grapevine-wine-trends-to-watch-for-in-2018.html>.

such a way as to mislead consumers about the quantities contained (27 CFR (a)(1)), and the limitation on headspace (27 CFR 4.71 (a)(3)).

The limitation on headspace reduces the risk of consumer confusion by causing the quantity contained to correspond closely to the volume of the container. Headspace is limited to 6 percent of capacity after closure for containers with net contents of 187 milliliters or more and 10 percent for other containers. The proposed rule would, if implemented, allow headspace that does not exceed 30 percent for clear containers with net contents of 100 milliliters or less.

Increasing the limit on headspace would create costs for consumers if it increased confusion about the quantities available for sale. However, the exception is limited to containers with contents clearly visible. Confusion about quantity contained would be less likely with clear containers than with opaque containers, because the quantity contained could be observed directly and consumers would be less likely to use container size as a proxy for quantity.

Standards of fill also may have created secondary benefits that would be foregone with their elimination. For example, standard sizes may facilitate price comparison by consumers. When the net contents of bottles are equal, the relative prices of the bottles correspond to the relative prices per unit of wine they contain. When container sizes differ, the relative prices of bottles may differ from the relative prices per unit, so the elimination of fill standards could make the comparison of prices per unit more difficult. Price per unit labeling by retailers would decrease an impact of eliminating fill standards on the ease of



comparison. Although price per unit labeling by retailers is common, it is not mandatory in most states, and, where it is mandatory, wine is typically excluded.<sup>3, 4</sup>

The introduction of products that do not correspond to the standards of fill could also create some costs for wine manufacturers, wholesalers, and retailers. Potential costs include those related to the renovation of production facilities, the distribution of containers that do not conform to current standards, and the reconfiguration of retail spaces. However, new products would only be introduced if profits from introducing them were, in expectation, positive.

Therefore the expected value to consumers of the new products would generally exceed the expected cost of their production, including any costs created by deviation from the standards of fill, so that the benefits of introduction would be at least as large as the costs.

### *Benefits*

This proposed deregulation could, if implemented, create a range of benefits. These include increasing economic efficiency by allowing producers to harness economies of scale, increasing the variety of products available to consumers, and increasing the competitiveness of the market for wine. We are unable to quantify the benefits, but we welcome public comment with relevant information.

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<sup>3</sup> National Institute of Standards and Technology, "Unit Pricing Guide: A Best Practice Approach to Unit Pricing." NIST Special Publication 1181 (2015), *available at* <https://www.nist.gov/sites/default/files/documents/2017/04/28/SP1181-Unit-Pricing-Guide.pdf>.

<sup>4</sup> National Institute of Standards and Technology, "U.S. Retail Pricing Laws and Regulations by State." *available at* <https://www.nist.gov/pml/weights-and-measures/us-retail-pricing-laws-and-regulations-state>.

The market for canned wine has grown rapidly in recent years. However, according to petitions from industry, the most common sizes of aluminum cans, like 200 milliliters, differ from the standards of fill.

Can makers must reconfigure equipment to change the size of the cans produced. This reconfiguration creates a fixed cost for each size produced. Producing more cans of a given size lowers the average cost per can because it spreads the fixed cost across a larger number of cans. The standard of fill closest to 200 milliliters is 187 milliliters. Petitions from industry indicate that the fixed costs associated with the production of 187 milliliter cans rather than 200 milliliter cans are substantial. Eliminating the standards of fill would allow wine makers to harness economies of scale and achieve lower costs by using the common 200 milliliter cans.

In some other countries, wine is produced in standard quantities that do not match the standards of fill in the United States. Reconfiguring those wine production facilities to produce bottles specifically for the United States creates a fixed cost. If the cost of reconfiguration is sufficiently high, no bottles may be produced for the United States, despite positive demand for those products at prices that correspond to production at scale.

Eliminating the standards of fill would allow more manufacturers producing primarily for foreign markets to sell their wines in the United States. The entry of those firms would increase competition in the wine market. More competitive markets allocate resources more efficiently by matching prices more closely to

costs, so an increase in the competitiveness of the wine market would create economic benefits.

The introduction of those products would also increase consumer choice by providing them with options they may prefer to those currently available.

Wines made primarily for foreign markets may not be the only new products introduced. Wine makers currently producing for the United States could also choose to introduce products that deviate from the current standards of fill.

Bottles that deviate from the current standards may allow consumers to more closely match the quantities they purchase to the quantities they desire to consume. Furthermore, some limited evidence suggests that consumers value novelty in bottle sizes, and novel bottle sizes may be of value to producers in differentiating their brands.<sup>5, 6</sup>

Increasing the limitation on headspace for clear containers of 100 milliliters or less could also improve consumer welfare by increasing the options available. Comment from industry indicates that current headspace restrictions are problematic for individually sealed glasses of wine, since filling the glasses to the top creates difficulties for both manufacturing and consumption. Increasing the limitation on headspace could decrease manufacturing costs and improve consumer experiences with individually sealed glasses of wine.

### *Alternatives*

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<sup>5</sup> Henrich Brunke, Franziska Thiemann & Rolf Mueller, "Odd Prices for Odd Bottles at VDP Auctions." Paper presented at Enometrics XVI conference of the Vineyard Data Quantification Society in Namur, Belgium (2009).

<sup>6</sup> . J. François Outreville, "Does the Bottle Size Matter? An Investigation into Differences between Posted and Market Price." American Association of Wine Economists Working Paper No. 86 (2011).

The requirement that net contents conform to standards of fill reduces the risk of consumer confusion about quantity at the cost of restrictions on producers that decrease market efficiency. Consumer information about net contents is also a concern for other types of beverages, and the regulatory approaches taken for those beverages present some alternatives to the proposed deregulation.

One alternative would be to add new standards of fill to the current list. For example, a 200 milliliter standard could be added to accommodate the use of aluminum cans. One problem with that approach is that the new standard would be only 13 milliliters above the current standard of 187 milliliters, a difference of slightly less than 7 percent of the smaller standard. Standards separated by such small amounts would be expected to do little to reduce consumer confusion. That problem could be addressed by providing separate lists of standards for cans and other containers, as have been provided for distilled spirits (27 CFR 5.47a), so that a significant difference between standards of fill was maintained for each category of container.

However, the piecemeal addition of new standards as circumstances change involves costs that are avoided by eliminating the standards of fill entirely. The addition of new standards through rulemaking would continue to involve the burden on industry of petitioning for new standards and awaiting the outcomes and the burden on the government of responding to the petitions and promulgating new rules.

Standards of fill are not the only tool available for reducing the risk of consumer confusion about quantities available for sale. The appearance of net contents on the label is another tool, and more prominent net contents labeling may achieve the same reduction in the risk of confusion without incurring the costs associated with the standards of fill. Currently, wine must generally conform to standards of fill, and net contents can appear on any label affixed to the container. Malt beverages need not conform to standards of fill, but net contents must generally appear on the brand label (27 CFR 7.22). Similarly, beverages like carbonated soft drinks need not conform to standards of fill, but net quantity of contents must appear on the principal display panel (21 CFR 101.7).

A second alternative to this proposed rule would be to eliminate the standards of fill but require that net contents appear on the brand label, analogous to the requirements for malt beverages and soft drinks. However, the requirement that net contents appear on the brand label would constitute a new mandate on wine makers. Changing labels would involve administrative costs as well as the costs of redesigning labels and replacing printing equipment like engraving plates or cylinders. The proposed rule avoids those costs by avoiding changes to the labeling requirements. In addition, introducing a new requirement to include net contents on the brand label could potentially lead to a conflict with the World Wine Trade Group Agreement on Requirements for Wine Labelling (“WWTG Labelling Agreement”), which provides that certain common wine mandatory labeling information (country of origin, product name, net contents

and alcohol content) be permitted to appear in any “single field of vision.” The WWTG Labelling Agreement sought to reduce regulatory burden on businesses in countries that are parties to the Agreement.

Currently, some wine products are not subject to the requirement that net contents conform to a standard of fill (27 CFR 4.70). However, when net contents do not conform to a standard of fill, net contents must appear on a label affixed to the front of the bottle (27 CFR 4.32(b)(2)). A third alternative is to eliminate the requirement that net contents conform to a standard of fill, but keep the standards of fill and keep the requirement that net contents be stated on a label affixed to the front of the bottle when the net contents do not conform to a standard of fill.

This alternative would impose no new mandate, although it would create some costs not created by the proposed rule. This alternative could also incur problems similar to the alternative above with regard to potentially conflicting with the WWTG Labelling Agreement. Additionally, some foreign producers that do not conform to the standards of fill may need to change their labeling to satisfy the labeling requirement for the U.S. market. However, wine makers would only be expected to undertake those changes if doing so maximized profits.

Therefore changes to labeling would only be expected if making them were less costly than conforming to the standards of fill. Furthermore, making such changes would only maximize profits if, in expectation, the value to consumers exceeded the cost of production, including the cost of any labeling changes.

We welcome comment on these and other alternatives, including information that will aid us in quantifying their costs and benefits.

#### Paperwork Reduction Act

The collection of information in this rule has been previously approved by the Office of Management and Budget (OMB) under the title “Labeling and Advertising Requirements Under the Federal Alcohol Administration Act,” and assigned control number 1513–0087. This proposed regulation would not result in a substantive or material change in the previously approved collection action, since the nature of the mandatory information that must appear on labels affixed to the container remains unchanged.

#### **Drafting Information**

Jennifer Berry of the Regulations and Rulings Division drafted this document, along with other Department of the Treasury personnel.

#### **List of Subjects in 27 CFR Part 4**

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Packaging and containers.

#### **Amendment to the Regulations**

For the reasons discussed in the preamble, TTB proposes to amend 27 CFR part 4 as follows:

#### **PART 4—LABELING AND ADVERTISING OF WINE**

1. The authority citation for part 4 continues to read as follows:

**Authority:** 27 U.S.C. 205, unless otherwise noted.

#### **§ 4.32 [Amended]**

2. In § 4.32(b)(2), the second sentence is removed.

3. In § 4.37:

a. Paragraph (a) introductory text is revised;

b. Paragraph (b) subject heading and introductory text are revised;

c. Paragraph (b)(1) is removed; and

d. Paragraphs (b)(2) and (3) are redesignated as paragraphs (b)(1) and (2), respectively.

The revisions read as follows:

**§ 4.37 Net contents.**

(a) Statement of net contents. The net contents of wine shall be stated in the metric system of measure in accordance with § 4.71 and as follows:

\* \* \* \* \*

(b) Optional statement of U.S. equivalent contents. Net contents in U.S. equivalents may appear on the label together with the required metric net contents statement if shown as follows:

\* \* \* \* \*

**§ 4.70 [Amended]**

4. Amend § 4.70 by:

a. In paragraph (a), the words “herein prescribed” are removed and the phrase “as prescribed in § 4.71” is added in its place;

b. In paragraph (b) introductory text, the phrase “Sections 4.71 and 4.72 of this part do” is removed and the phrase “Section 4.71 of this part does” is added in its place; and



c. In paragraph (c), the phrase “Section 4.72” is removed and the phrase “Section 4.71.” is added in its place.

5. Section 4.71 is revised to read as follows:

**§ 4.71 Standard wine containers.**

(a) A standard wine container must be made, formed, and filled to meet the following specifications:

(1) Design. It must be so made and formed as not to mislead the purchaser. Wine containers must (irrespective of the correctness of the net contents specified on the label) be so made and formed as not to mislead the purchaser if the actual capacity is substantially less than the apparent capacity upon visual examination under ordinary conditions of purchase or use;

(2) Fill and tolerances. It must be so filled as to reflect the quantity, including tolerances, specified for wine in the net contents provisions of § 4.37 but may not have a fill of less than 50 milliliters; and

(3) Headspace. It must be designed and filled so that the headspace, or empty space between the top of the wine and the top of the container, meets the following specifications:

(i) Except as provided in paragraph (a)(3)(iii) of this section, if the net contents stated on the label are 187 milliliters or more, the headspace must not exceed 6 percent of the container's total capacity after closure.

(ii) In the case of all other containers, except as described in paragraph (a)(3)(iii) of this section, the headspace must not exceed 10 percent of the container's total capacity after closure.

(iii) Exception. Wine bottled in clear containers, with the contents clearly visible, that are 100-milliliters or less may have a headspace that does not exceed 30 percent of the container's total capacity after closure.

(b) [Reserved]

**§ 4.72 [Removed and Reserved]**

**6.** Section 4.72 is removed and reserved.

Signed: June 18, 2019.

**Mary G. Ryan,**

Acting Administrator.

Approved: June 20, 2019.

**Timothy E. Skud,**

Deputy Assistant Secretary  
Tax, Trade, and Tariff Policy.

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